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Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-7085.

JOSEPH LEPAGE AND HERBERT ESKEDAHL,
PETITIONERS,

v.

PHILIP J. PICARD, SUPERINTENDENT,
MASSACHUSETTS CORRECTIONAL INSTITUTION,
NORFOLK,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief for the Respondent in Opposition.

The respondent is not dissatisfied with the petitioners' statement of jurisdiction and citation to opinion below.

Questions Presented.

1. Whether the District Court applied, and the Circuit Court approved, a proper standard of proof under 28 U.S.C. § 2254(d) after hearing on petitioners' request for habeas corpus relief.

2. Whether the petitioners were denied the assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

Statement of the Case.

This is a joint petition of Joseph F. LePage and Herbert A. Eskedahl for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the First Circuit, which had affirmed the decision of the District Court, dismissing petitions for habeas corpus which had been filed pursuant to 28 U.S.C. § 2254. Both petitioners are now, and were at all times pertinent to these proceedings, serving life sentences pursuant to judgments of conviction for the crimes of murder and armed assault with intent to murder, rendered by the Superior Court of Middlesex County, Massachusetts, in 1965. These trial court judgments were unanimously affirmed by the Supreme Judicial Court of Massachusetts: *Commonwealth* v. *LePage*, 352 Mass. 403 (1967).

In their application to the District Court, the petitioners alleged that they were "improperly detained, arrested without a warrant and interrogated and [were] deprived of the assistance of counsel in violation of [their] rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution" (Memorandum, 1).* At the hearing in the District Court the petitioners agreed that the court should consider the petitions as limited to their claim that the denial of their pre-trial motion to suppress and subsequent admission into evidence of incriminating statements were in violation of this Court's decision in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (Memorandum 1-2).

* The Memorandum of Decision of the District Court which is attached as exhibit A to the petition is herein referred to as "Memorandum."

The District Court received into evidence the twelve volumes of the transcript of evidence at the trial, and that transcript included the voir dire testimony on the motions to suppress and the state trial judge's findings as to admissibility of the confessions. The findings of the trial judge admitting the confessions in evidence were that:

> "On the defendants' motions to suppress . . . I rule that on the evidence adduced at the voir dire on February 12, 1965, which is embraced in pages 1182-1508 of the transcript in this matter, the constitutional rights of the defendants were not violated, and that the defendants were not prejudiced with respect to any such rights.
>
> "I find that so much of the oral admissions and statements made by either of the defendants of an incriminating nature to police officers and police officials at the police interrogation of them at the Cambridge Police Station on the night of March 13 to 14, 1964, as constituted a confession by either of the defendants were given voluntarily and were neither coerced by the police nor induced by any promises made by the police and therefore that the same are to be received in evidence before the jury under appropriate instructions." (Memorandum 5-6.)

The District Court explicitly noted that the trial judge's findings contained no express findings by the trial judge of the historical facts involved in the conflicting voir dire testimony, and no express determination by the trial judge as to the credibility of the voir dire witnesses. (Memorandum 3, 6). And the District Court further noted that the trial judge's written findings made no *specific* mention of *Escobedo* and that the findings in support of the ruling that "constitutional rights of the defendants were not vio-

lated'' were not articulated on the issue of access to counsel, but rather upon the absence of coercion or inducement by promises on the part of the police in obtaining the otherwise voluntary statements (Memorandum 7).

The District judge, after reviewing the trial transcript and written findings, concluded that it was unclear whether the trial judge decided the constitutional claim under *Escobedo* and, referring to this Court's decision in *Townsend* v. *Sain*, 372 U.S. 293 (1963), denied motions to dismiss and proceeded to conduct a discretionary evidentiary hearing: ''in order to justify the assumption that the trial judge passed on the merits. . . .'' (Memorandum 7.)

The evidentiary hearing before the District Court lasted four days, during which the court heard evidence from several witnesses, including the petitioners, who had not earlier testified at their trial or at the pre-trial voir dire.

In its written memorandum denying the petitions, the District Court meticulously reviewed the testimony before the trial judge and summarized the evidence in the federal hearing, explicitly noting the conflicts in that testimony and, further, explicitly noting the criteria upon which the District Court determined issues of credibility. The District Court concluded, *inter alia*:

1. That the critical question upon the review is whether during the interrogation the petitioners had requested and been denied an opportunity to consult with counsel (Memorandum 9).

2. That the petitioners would be bound by a ''convincing evidence'' standard under 28 U.S.C. § 2254(d) unless the existence of one or more of the circumstances in § 2254(d) was shown (Memorandum 9).

3. That the petitioners are not aided in sustaining their burden by the trial judge's omission expressly to deal with his view of the credibility of the witnesses, if otherwise it is apparent from the evidentiary hearing in the federal

court and the state court record that the trial judge did resolve the petitioners' factual contentions against them (citing *LaVallee* v. *Delle Rose*, 410 U.S. 690 (1973) (Memorandum 9).

4. That the evidence was not convincing that the police refused to permit the petitioners to consult counsel (Memorandum 12).

5. That in the context of the evidence in the federal court and the absence of any evidence in the state court record relating to a request for counsel, it is clear that the trial judge resolved the factual contention that the petitioners had requested and been denied opportunity to consult with counsel, within the meaning of *Escobedo* against them. (Memorandum 12).

6. That in this regard, though not yet decided, *Frazier* v. *Cupp*, 394 U.S. 731 (1969), is not distinguishable from petitioners' cases (Memorandum 12).

7. That the testimony offered at the evidentiary hearing in the federal court was not convincing that the trial judge did not resolve against petitioners the factual contention that petitioners' counsel had been denied access to them by the police before the confessions were given, within the meaning of *Escobedo* (Memorandum 13).

On appeal, the Circuit Court concluded, in *LePage* v. *Picard*, 495 F. 2d 26 (1st Cir. 1974), *inter alia*:

1. That the District Court properly applied a "convincing evidence" standard under 28 U.S.C. § 2254.

2. That the District Court properly entertained the assumption that the state court had resolved petitioners' factual contentions against them.

3. That the District Court followed "the letter of the statute" in requiring that "the applicant[s] . . . establish[ed] by *convincing* evidence that the factual determination by the state court was erroneous." 495 F. 2d at 29 (emphasis in original).

Argument.

Reasons Why the Petition is Opposed.

I. *The District Court Applied, and the Circuit Court Approved, a Proper Standard of Proof under 28 U.S.C. § 2254(d).*

The District Court below addressed the question of standard of proof as follows:

> "28 U.S.C. § 2254(d) states that 'in an evidentiary hearing . . . unless the existence of one or more of the [eight] circumstances' is shown, 'the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous.' [Footnote omitted.] Thus petitioners must satisfy this court persuasively that the determination by the trial judge that their 'constitutional rights . . . were not violated' and their confessions were admissible in evidence, was erroneous under the standards enunciated in *Escobedo* v. *Illinois, supra.* 'Convincing evidence' does not mean proof beyond a reasonable doubt, nor does it mean the mere preponderance of the evidence. The standard lies somewhere between these expressions of degree of proof. See *Developments—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1145 (1970). Convincing evidence is that degree of proof that persuades the trier of facts of the truth of the facts claimed, and moves him to accept the evidence in the light of other contrary evidence as support for the claim. Petitioners are not aided in sustaining their burden by the trial judge's omission to expressly deal with his view of the credibility of the witnesses, if otherwise it is apparent from the evidentiary hearing here and the state court record that

the trial judge did resolve petitioners' factual contentions against them. See *LaVallee* v. *Delle Rose*, 410 U.S. 690 (1973)." (Memorandum 9.)

The Circuit Court addressed the question of standard of proof as follows:

> "We turn now to the question of the appropriate burden of proof. The categories established in *Townsend* for mandatory hearing are codified in 28 U.S.C. § 2254(d). *See, e.g.*, Maxwell v. Turner, 411 F. 2d 805 (10th Cir. 1969); United States ex rel. Hughes v. McMann, 405 F. 2d 773, 776 (2d Cir. 1968). The statute employs the *Townsend* categories not to indicate when hearing is required but rather to establish the standard of proof which is to be applied to all hearings. *See* Developments in the Law, Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1122, n. 46, 1141 (1970).
>
> "Where the petitioner establishes any of the eight enumerated circumstances, a *preponderance* of evidence will suffice to show trial error." 495 F. 2d at 29 (emphasis in original).

concluding that,

> "As we have indicated, the petitioners failed to establish one of these circumstances. The district court followed the letter of the statute in requiring 'the applicant[s] to establish by convincing evidence that the factual determination by the State court was erroneous.' 28 U.S.C. § 2254(d) (emphasis supplied)." 495 F. 2d at 29.

Apparently, petitioners before this Court suggest that one of the eight circumstances of § 2254(d) was established, and the District Court was in error in conducting,

with explicit reliance upon *LaVallee*, that the trial judge resolved the factual contention that petitioners had requested and been denied opportunity to consult with counsel, within the meaning of *Escobedo*, against them (Memorandum 9, 12).

In *LaVallee*, this Court referenced *Townsend* v. *Sain*, *supra*, as the precursor of 28 U.S.C. § 2254(d), and noted the following excerpts from *Townsend*:

> " '[T]he possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied. Furthermore, the co-equal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of facts applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied. Thus, if third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession.' " 410 U.S. at 694.

Respondent in the instant case suggests that this excerpt from *Townsend* is applicable to the action of the District Court below and its disposition of the petitioners' application for habeas corpus; and, finally, that the Circuit Court was correct in approving this application, explicitly noting that the petitioners' rights with respect to

the *Escobedo* issue were vigorously argued in a special hearing on the evidence in question. 495 F. 2d at 29. See *Townsend, supra,* at 314.

II. *The Circuit Court of Appeals Properly Affirmed the District Court's Legal Evaluation that the Petitioners were Not Denied the Assistance of Counsel in Violation of the Sixth Amendment to the United States Constitution.*

The Circuit Court of Appeals, in reviewing the District Court's factual findings and the District Court's legal evaluation, stated as follows:

> "The court, applying the appropriate standard, held: 'The evidence is not convincing that the police refused to permit them to consult counsel.' The court supported this conclusion by assuming a version of events, favorable to petitioners, evidenced by police records (recorded after the events) and petitioners' statements paralleling the records [Footnote omitted.] Even with these facts assumed the court found that petitioners were effectively warned of their right to be silent; that they were permitted to phone an attorney, friends, or family [footnote omitted]; that there was only a passing request for counsel, not renewed; and that no attempt was made to terminate the questioning. The court further held that Mr. Travers, the attorney for petitioners, who said he 'demanded' to see his clients was at times confused and was not a wholly reliable witness. Even by his own testimony, his actions were inconsistent with his desire to see his clients. The district court ruled that the state court would have been justified in disbelieving his testimony and could have supportably found 'that Travers failed to

> make a clear demand or that the demand was made after the confessions were given.' [Footnote omitted.)" 495 F. 2d at 29-30.

In this Court's decision of *Frazier* v. *Cupp*, 394 U.S. 731 (1969), distinction, or at the least, comparison, was made between the *Escobedo* standard and the standard in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), with respect to statements made by a criminal suspect about "getting a lawyer." 394 U.S. at 78. This Court noted that the police in *Escobedo* were unmistakably informed of their suspects wishes as compared with the statement made by petitioner Frazier which was neither as clear nor as unambiguous as the request made by *Escobedo*.

For purposes of this petition for writ of certiorari, the respondent suggests that this Court's decision in *Frazier* is substantially indistinguishable, and that, additionally, questions raised in the petition, purporting to distinguish *Frazier* from the instant case, are actually and substantially a request to this Court to review evidence and discuss specific facts.

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Conclusion.

The respondent suggests that the District Court applied, and the Circuit Court approved, a proper standard of proof under 28 U.S.C. § 2254(d) after hearing on petitioners' request for habeas corpus relief and, assuming a proper standard of proof, the evidential and factual determinations of the lower federal courts are correct, and, in any event, do not warrant review by this Court on certiorari. The petition should be denied.

Respectfully,

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